as well but at the trial relied only on the exception to section 75 and since the facts were in no way disputed, Counsel were content to submit on the only issue as to whether the deceased was in the lorry by reason of or in pursuance of a contract of employment.

At the time of the accident on June 26, 1969, the insured was the owner of a smoke house as well as the lorry, AJ 2418, which he had insured with the defendants. He used this lorry to transport wet rubber sheets to the smoke house and also to transport smoked rubber sheets to a shop in Ayer Tawar where the sheets were eventually sold. The deceased was a rubber smallholder and he had some business arrangements with the insured whereby he used the insured's smoke house to dry his rubber sheets and also the insured's lorry to transport his smoked rubber sheets to Air Tawar where they were sold.

The smoke house was constructed on stilts to allow the back portion of the lorry to be driven underneath the smoke house to facilitate the unloading of the wet rubber sheets. On the day of the accident, the lorry was so parked and the deceased was in the lorry assisting the insured in unloading wet rubber sheets. Once the unloading was over, he was to load his own smoked sheets into the lorry to be transported to Ayer Tawar. Before doing so, he had placed a zinc sheet to cover the wet floor board and it was only after this that the deceased was able to start loading his own smoked sheets into the lorry. For this purpose, the back portion of the lorry had to be driven from underneath the smoke house so that the smoked sheets could be thrown from the smoke house into the back of the lorry. The insured got into the lorry and without ascertaining whether the gear was in neutral position, started the engine. The gear was in fact in a reverse position and at the start of the engine, the lorry jerked backwards causing the deceased who was standing immediately behind the cabin of the lorry to be thrown backward and his head was crushed in between the cross-beam of the smoke house and the cabin of the lorry.

On these facts, I shall now consider whether the deceased's presence on the lorry at the time of the accident was by reason of or in pursuance to a contract of employment. It is not disputed that the deceased was not employed by the insured or for that matter by anybody else. He was at the smoke house regularly as he had some business arrangements with the insured as to the use of the smoke house to dry his wet rubber sheets and to transport his own smoked sheets to Ayer Tawar by using the insured's lorry. As far as I can see, this business arrangement particularly with regard to the use of the insured's lorry concerned the transportation of the deceased's own goods to Ayer Tawar and it did not relate to a contract of employment at all. That being the case, the deceased's presence on the lorry at the time of the accident cannot be said to be by reason of or in pursuance to a contract of employment. Since he was not covered by the policy, the defendants cannot be held liable to satisfy the judgment obtained by his personal representatives against the insured. As such, this action must fail and I accordingly dismiss it with costs.

Claim dismissed.

Solicitors: *Murphy & Dunbar; Mah Kok & Din.*

LAW MUN & ORS. v. CHUA LAI SENG & ORS.

[O.C.J. (Shankar J.) June 28, 1984]

[Muar – Civil Suit No. 197 of 1983]

Practice & Procedure – Summons for Directions – Failure of plaintiff to take out – Effect of – R.H.C. 1980, O.25 r.1(4) & O.34 rr.2(2) & 8(1).

Legal Profession – $1 million fee charged by solicitor – Proceedings against solicitor – Conditional leave to defend.

Practice & Procedure – Summary judgment application – Conditional leave to defend – "Liberty to apply" – Meaning of.

On July 20, 1983 the plaintiffs filed action for the recovery of $1 million with interest thereon. They claimed that in 1981 they first entered into an agreement with the first and second defendants for the sale of their shares in Inroad Housing Sdn. Bhd. for a consideration of $6 million. After this agreement had been entered into, the first and second defendants persuaded the plaintiffs to enter into a second agreement the terms of which were substantially the same. However, the third defendant was also a party to the second agreement. All the 3 defendants now became jointly and severally liable to the plaintiffs for the full purchase price of $6 million. In this transaction the first defendant acted as the solicitor both for the plaintiffs as vendors and for the defendants as purchasers. The full sum of $6 million was at some stage in the first defendant's hands. But only $5 million reached the plaintiffs. The balance of $1 million did not. The first defendant did

not deny this. As to the balance of the $1 million he contended that there was an agreement between himself and the plaintiffs that this money was "to be treated as an entitlement of the first named defendant".

On February 16, 1984 the present court gave conditional leave to defend. The first and second defendants were ordered to pay into court the sum of $1 million together with interest thereon at 6% per annum from December 12, 1981 up to March 29, 1984 and that this money was to remain in court until further Order as to its disposal. On March 10, 1984, a consent order was procured allowing the first and second defendants to furnish a bank guarantee as security to the value of $1.16 million.

The first defendant applied by way of a Summons-in-Chambers for (a) the dismissal of the action for the alleged failure of the plaintiff to take out a Summons for Directions, or to set down the action for trial or to give notice of trial or in the alternative for a stay of action until all pre-trial procedures are complied with by the plaintiffs, (b) for the existing order requiring the defendant to provide a bank guarantee for $1,160,000/– to be varied so as to permit shares or title to property to be deposited in lieu to satisfy the terms upon which conditional leave to defend has been granted, and (c) the action be heard by another judge.

Held, dismissing the application, (1) the application for summary judgment became a notional summons for directions when the order granting conditional leave was made, and Order 25 rules 2 to 7, must be applied *mutatis mutandis* to this situation;

(2) it is a misconception for the defendant to contend, as was done in this case, that Order 25 rule 1(4) gives him an option only to apply for a dismissal of the action in such a situation. The defendant is also entitled under Order 25 rule 1(4) to apply for any directions he thinks necessary for the proper conduct of the trial and that option was open to him at all material times on and after February 16, 1984. A number of applications were in fact made on behalf of the first defendant before the hearing date, but it was never contended until April 17, 1984 that a summons for Directions should be taken out;

(3) as solicitor for both parties, one may be excused perhaps for thinking that the first defendant would have known of the identity and existence of any other documents which were relevant to this matter. As there is no reference to any specific facts or documents in the affidavit in support of the application, the court was unable to hold that the defendant had been prejudiced by the omission to go through the motions of taking out a Summons for Directions;

(4) the application for a stay until the parties have gone through the process of general discovery must also fail;

(5) "liberty to apply" is given to enable matters to be dealt with in the implementation of the order. It does not give a right to ask the court to vary an order. A consent order can only be varied by consent in the absence of fraud or some other circumstances which vitiate the consent;

(6) the contention that a judge who gives leave to defend upon terms should thereafter not hear the case at the trial is not supported by any authority. The contention is also not calculated to facilitate the efficient disposal of cases but rather to delay the business of courts even further.

Cases referred to:

(1) *Cristal* v. *Cristal* [1951] 2 K.B. 725.

(2) *R.* v. *Camborne Justices Exparte Pearce* [1954] 2 All E.R. 850.

(3) *Brassington* v. *Brassington* [1961] 3 All E.R. 988.

(Cases also cited: *Boyle* v. *Sacker* 39 (1888) Ch. D. 249; *Fry* v. *Moore* 23 (1889) Q.B.D. 395; *Lloyd and wife* v. *Great Western Dairies Co.* [1907] 2 K.B. 727; *Ainsworth* v. *Wilding* [1896] 1 Ch. D. 673; *Re Affairs of Elstein* [1945] 1 All E.R. 272; *R.* v. *Rand & Ors.* (1886) L.R. 1 Q.B. 230; *Harkness* v. *Bell's Asbestos and Engineering Ltd.* [1966] 3 All E.R. 843; *Government of State of Pahang* v. *Tengku Abdul Aziz & Anor.* [1978] 2 M.L.J. 34).

SUMMONS-IN-CHAMBERS.

Subra Naicker for the plaintiffs.

P. Suppiah for the first defendant.

Anthony Fernandez for the second defendant.

Sri Kumar and K. Y. Chew for the third defendant.

Cur. Adv. Vult.

Shankar J.: This is an application by the first Defendant by way of a Summons-in-Chambers for the dismissal of this action for the alleged failure of the Plaintiff to take out a Summons for Directions, or set down the action for trial or to give notice of trial or in the alternative for a stay of the action until all pre-trial procedures are complied with by the Plaintiffs. It is coupled with an application for an existing order requiring the Defendant to provide a bank guarantee for $1,160,000/– to be varied so as to permit shares or title to property to be deposited in lieu to satisfy the terms upon which conditional leave to defend has been granted. Finally there is also a further application that the action be heard by another Judge. These applications will not be intelligible unless the steps taken so far in this action are set out at some length.

On July 20, 1983 the Plaintiffs filed this action for the recovery of $1 million with interest thereon. They claimed that in 1981 they first entered into an agreement with the first and second Defendants for the sale of their shares in Inroad Housing Sdn. Bhd. for a consideration of $6 million. After this agreement had been entered into the first and second Defendants persuaded the

Plaintiffs to enter into a second agreement the terms of which were substantially the same. However, the third Defendant was also a party to the second agreement. All the 3 Defendants now became jointly and severally liable to the Plaintiffs for the full purchase price of $6 million. In this transaction the first Defendant acted as the solicitor both for the Plaintiffs as vendors and for the Defendants as purchasers.

There seems to be no argument that the full sum of $6 million was at some stage in the first Defendant's hands. But only $5 million reached the Plaintiffs. The balance of $1 million did not. They therefore filed this action.

On August 16, 1983 the Defendants entered an appearance by their solicitors M/s Chew and Co.

On September 28, 1983 the Plaintiffs applied for Summary Judgment under Order 14 Rule 1 of the Rules of the High Court. The application was supported by a most comprehensive affidavit which has attached to it a multitude of documents which appear to cover the entire history of the claim.

On October 11, 1983 Mr. Thara Singh Sidhu filed a notice stating that he had taken over as a solicitor for the first and second Defendants. The third Defendant continued to be represented by M/s Chew and Co. The Order 14 Application was initially fixed for disposal on November 24, 1983.

On November 3, 1983 the third Defendant filed their Defence. On November 18, 1983 the first and second Defendants filed their defences also. But as regards the application for Summary Judgment the first Defendant did on November 17, 1983 file a most comprehensive affidavit to show cause why Summary Judgment should not be given against him. This affidavit is also supported by a multitude of documents.

For the purposes of the present judgment it is not necessary to go in great detail into the somewhat complicated history of this matter. Suffice it to say that the first Defendant in his affidavit does not deny that he had the full sum of $6 million in his hands and that he only made over the sum of $5 million to the Plaintiffs. As to the balance of the $1 million it is his contention that there was an agreement between himself and the Plaintiffs that this money was "to be treated as an entitlement of the first named Defendant". This contention appears in paragraph 4 of his defence. In paragraph 6 of his affidavit he says in so many words that the Plaintiffs "agreed that he need not pay the balance of $1 million as it was my entitlement for bringing about a successful conclusion of the Plaintiff's shares in Inroad." On November 23, 1983 the Plaintiffs filed a most comprehensive affidavit in reply attaching to it again a multitude of documents. Thus when the matter came on for disposal on the next day, Mr. Thara Singh Sidhu applied for an adjournment on the grounds that he wished to file a further affidavit. The matter was further adjourned.

On January 2, 1984 the first Defendant filed a very lengthy affidavit. On February 8, 1984 the third Defendant filed yet another affidavit. So when the Order 14 application came on for disposal on February 12, 1984 it was apparent that both parties had put into evidence whatever documents they considered relevant for the purposes of the application.

For reasons which will become apparent hereafter it is worthwhile mentioning that at the material time the High Court in Muar did not have an incumbent Senior Assistant Registrar. The President of the Sessions Court was doubling up and in the circumstances it does not seem surprising that the Summons in Chambers for Summary Judgment was listed for hearing not before the Senior Assistant Registrar but before the Judge in Chambers. This fact was known to all parties concerned from September 1983 and no reservations were expressed about it at the time. The matter was one of obvious complexity and since it could not be disposed of in a few minutes it was adjourned from Chambers into Open Court on February 12, 1984. The arguments on both sides took the whole day.

A fee of $1 million for professional legal services may be thought to be somewhat unusual. It was therefore not surprising that this issue received some emphasis in the course of the arguments. Mr. Subra Naicker for the Plaintiffs made much of the fact that nowhere in his affidavit had the first Defendant clarified what special services he had rendered to earn this $1 million. Mr. Thara Singh Sidhu was not able to take this aspect of the matter very much further.

There were of course a variety of other points which were canvassed by both parties. I have advisedly refrained from going into those matters in any depth in the present judgment because it is my respectful view that on an Order 14 application it is neither necessary nor advisable to take a closed position on the facts. On the other hand it behoves one to keep an open mind until all the evidence has been heard. However, in the circumstances of this case it is hoped that one may be pardoned for stating that where a solicitor claims to be entitled to $1 million by way of professional fees the parties concerned are entitled to ask what he did to feel that he could charge a fee of this magnitude. Indeed, in so far as my recollection goes I put such a question quite pointedly to Mr. Thara Singh Sidhu in the course of the argument. After hearing the arguments I reserved judgment. On February 16, 1984, and in Open Court I read out a written Order which I had made under which I gave conditional leave to defend.

So far as the first and second Defendants were concerned my Order was that they should pay into court the sum of $1 million together with interest thereon at 6% per annum from December 12, 1981 up to March 29, 1984 and that this money was to remain in Court until further Order as to its disposal.

Shortly thereafter a Notice of Appeal was filed by the Defendants against this Order. On this point it is relevant to state that there is no resident Judge at Muar. On February 25, 1984 Mr. Thara Sidhu filed a Summons in Chambers applying for a variation of the Order granting leave to defend so as to be permitted to substitute a bank guarantee or alternatively a deposit of documents of title by way of security up to the value of $1.12 million. This Summons was fixed for disposal at the Johor Bahru High Court, there being no resident Judge at Muar. Be it noted that at this stage there was no formal application or Order by the parties for a transfer of the action from Muar to Johore. Only for the convenience of the parties and their counsel and for expedience the matter was proceeded with from then on in Johor Bahru.

On February 27, 1984 Mr. Thara Singh Sidhu appeared in Chambers in Johor Bahru and requested for an adjournment of his application for a variation of the conditional leave giving leave to defend on the basis that the Defendants were not proceeding with the appeal. Time was accordingly extended up to March 13, 1984.

On March 6, 1984 Mr. Thara Singh Sidhu wrote to the court asking for his application for variation to be re-listed for hearing and gave notice that he had come to terms with Mr. Subra Naicker for the Plaintiffs as to the variation by way of a substitution for a bank guarantee. On March 7, 1984 he filed a Summons in Chambers which was designated for hearing at the Johor Bahru High Court for March 10, 1984. On that day Mr. Thara Singh Sidhu requested Mr. Paramjothy to appear on his behalf and the parties procured a consent order whereby instead of depositing $1 million cash with interest thereon into court as a condition for leave to defend, the first and second Defendants were, pursuant to a prayer made on their behalf by their solicitors, to furnish a bank guarantee as security to the value of $1.16 million. The terms of the guarantee were to be agreed by the Plaintiff and the guarantee furnished by March 13, 1984. This Order was minuted in the Judge's Chamber Note-book.

By a letter dated March 13, 1984 Mr. Thara Singh Sidhu sent to the High Court at Muar a bank guarantee dated March 12, 1984 issued by the United Malayan Banking Corporation Bhd. In his letter Mr. Thara Singh Sidhu says:—

> "But by an Order of Court made by His Lordship Mr. Justice Shankar allowed the first and second Defendants herein to furnish a bank guarantee for the sum of $1.16 million by or before March 13, 1984.
>
> We are pleased to inform Your Honour that our clients have obtained the guarantee and hereby enclose it for your retention.

The third Defendant took out a Summons for Directions on March 14, 1984 relating to claims for indemnity and a contribution which was disposed off on March 20, 1984. On that date Mr. Thara Singh Sidhu was absent. At this point it is necessary to refer to another action. This is Muar High Court Civil Suit 318 of 1983. In this action the Defendants, Chua Lai Seng, Dato' Sri Au Ba Chi and Grand Ocean Development Bhd. were the Plaintiffs and the Plaintiffs in CS 197/83 were the Defendants. The subject matter of the Civil Suit 318/83 also arose out of the very same agreement upon which the Plaintiffs in Civil Suit 197/83 were suing. It was a money claim for a sum of about $361,000/— for alleged breach of warranties. On behalf of the Defendants Mr. Sri Kumar for the third Defendant applied for and obtained an Order that Civil Suit 318/83 be consolidated with Civil Suit 197/83 and be disposed off on March

27, 1984. Mr. Subra Naicker had no objections to this application and accordingly a consent order was made that both actions be consolidated and tried together. After a short adjournment Mr. Sri Kumar was able to confirm to the court that he had spoken to Mr. Thara Singh Sidhu on the telephone and that he had agreed to the suit being disposed off in Johor Bahru. Accordingly parties were notified that the case would proceed on March 27, 1984 at Johor Bahru at 9.30 a.m.

On March 27, 1984 the parties appeared in Open Court at Johor Bahru. The first Defendant was absent. Mr. Thara Singh Sidhu applied for an adjournment. The court was reluctant to grant this adjournment. The parties then applied for a short adjournment and thereafter a joint application was made on behalf of all concerned that the hearing be continued from April 9 to 12, 1984. An Order was accordingly made by the consent of all parties that the case be proceeded with on April 9, 1984.

By a letter dated April 3, 1984 the first Defendant requested Mr. Thara Singh Sidhu to apply for the case to be heard before another judge. Various grounds were advanced in this letter as to why such an application should be made. It would seem from the text of the letter and particularly the last paragraph that Mr. Chua Lai Seng intended that the application for transfer should be made by a letter and he instructed Mr. Thara Singh Sidhu to send carbon copies of his letter (i.e. Mr. Thara Singh Sidhu's letter for the transfer) to their Lordships the Lord President and the Chief Justice. But Mr. Thara Singh Sidhu did not apply for the transfer. Instead he wrote a letter dated April 4, 1984 to the Senior Assistant Registrar at Muar giving Notice that he was discharging himself from further acting for the first Defendant and enclosed what appears to be the original copy of Mr. Chua's letter to him for perusal by me. Copies of these documents were extended to the Lord President and the Chief Justice. Further a copy of Mr. Thara Singh Sidhu's letter to the Registrar was extended by him to Mr. Chua Lai Seng requesting him to file the necessary notice that Mr. Chua Lai Seng will now act in person and make the application for a transfer himself.

This was the scenario when the matter came on for hearing on April 9, 1984. Mr. Chua had filed his Notice to say that he was acting in person. He applied for the case to be transferred before another Judge on the grounds set out in his letter to his solicitor dated April 3, 1984. Strenuous objections were taken to this application by the plaintiff's solicitors. Solicitors for the other 2 Defendants also objected to the application and in the event I declined to make the Order and directed the case to proceed. Mr. Chua then applied for an adjournment to engage counsel.

The case had been fixed for hearing from April 9 to 12, 1984 and since it appeared that the Plaintiff's case would occupy a substantial portion of the days allotted that application was also disallowed but Mr. Chua Lai Seng was informed that he could renew his application for adjournment at the conclusion of the Plaintiff's evidence. Mr. Chua indicated that he wished to take no further part in the proceedings except to remain silent and not cross-examine. The case then proceeded and the Plaintiffs led evidence.

When the hearing resumed on April 10, 1984 a medical certificate was submitted on behalf of the first Defendant to say that he could not attend court. The Doctor who issued the certificate was also called and gave evidence of the first Defendant's incapacity. Despite strenuous objections from the Plaintiff's counsel and others I adjourned the matter for mention to April 18, 1984. On that day Mr. P. Suppiah appeared in Open Court for the first Defendant and disclosed that the day before i.e. on April 17, 1984 he had caused to be filed at the Registry in Muar the Summons in Chambers which is the subject matter of the present judgment. He gave verbal notice of the contents of the application he had made and handed up a copy of the application. In the interest of justice I directed that no further action be taken until this application had been disposed off. Eventually it came on before me at Muar on May 17, 1984. The application is supported by an affidavit of the first Defendant deposed to on April 17, 1984. Basically the grounds in support of the application are the same as those contained in the letter of the first Defendant dated April 3, 1984. At the outset Mr. P. Suppiah requested that this application be stood over until the disposal of the appeal which he claimed was still pending against my Order of February 16, 1984 giving conditional leave to defend. I took the view that if the appeal was successful it could only go to the terms upon which the Defendant was to be permitted to continue to defend his action. If the appeal failed then the terms upon which the Defendants were to

defend would stand subject to the manner in which the parties had consensually varied my Order granting conditional leave. In any event someone would have to deal with the present application sooner or later and I accordingly directed the parties to proceed.

I heard very careful arguments from Mr. P. Suppiah on behalf of the first Defendant and counsel for the other parties and I indicated that I would in due course give reasons in writing for the Order which I proposed to make. This I do now.

The first issue here is whether this action which is already part heard should now be dismissed for the failure of the Plaintiffs to take out a Summons for Directions under Order 25 rule 1 (4) or for alleged want of prosecution for failure to set down the action for trial or to give notice of trial as provided by Order 34 rule 2(2) and rule 8(1) respectively.

The second and third points can be disposed of first. When I made the order granting conditional leave to defend on February 16, 1984 I directed the action to be heard on March 27, 28 and 29, 1984. Since the court had given a direction setting the action down for trial and given the parties notice thereof I cannot see any merit in these contentions.

The omission to take out the Summons for Directions was a somewhat more difficult point. Mr. Suppiah's argument is that Order 25 rule 1(1) is mandatory and that Order 25 rule 1(4) gave the Defendant an option to apply for an order to dismiss the action. He seems to imply that not having the privilege of discovery by way of Affidavits of Documents, Interrogatories, and Inspection had seriously prejudiced the first Defendant in his preparation for the trial of this action.

The Plaintiffs on the other hand relied upon Order 25 rule 2(a), the material words of which read:–

"This rule applies to all actions begun by writ except –

(a) Action in which the plaintiff ..... has applied for judgment under Order 14, ... and directions have been given under the relevant Order;"

Mr. Sri Kumar pointed out that Order 14 rule 4(3) read together with Order 14 rule 6(1) confer upon the court a discretion to give directions and early trial and to dispense with pre-trial procedures. In material particular these rules read:–

Order 14 rule 4(3):–

"The court may give a defendant ..... leave to defend ..... on such terms as to giving security on time or mode of trial or otherwise as it thinks fit.

Order 14 rule 6(1)

"Where the court –

(a) orders that a defendant ..... has leave to defend ..... the court may give directions as to the further conduct of the action ..... and Order 25, rule 2 to 7, shall ....., apply as if the application under rule 1 of this Order, ... on which the order was made were a summons for directions."

My reading of the meaning of these rules is that the application for Summary judgment became a notional Summons for directions when the order granting conditional leave was made, and Order 25 rules 2 to 7, must be applied *mutatis mutandis* to this situation. It is a misconception for the defendant to contend, as was done in this case, that Order 25 rule 1(4) gives him an option only to apply for a dismissal of the action in such a situation. The defendant is also entitled under Order 25 rule 1(4) to apply for any directions he thinks necessary for the proper conduct of the trial and that option was open to him at all material times on and after February 16, 1984. A number of applications were in fact made on behalf of the first Defendant before the hearing date, but it was never contended until April 17, 1984 that a Summons for Directions should be taken out.

With the greatest respect to Counsel for the first Defendant this was too late to try and turn the clock back. Once the trial began the general directions which may have been of moment earlier, must of necessity have turned to the specific. If there is any particular document that needs to be discovered even at a late stage or any special direction that needs to be issued in the interests of justice the court in a proper case will always entertain the application if not under any specific rules (See e.g. Order 24 rules 7 and 8, Order 26 rules 2 and 9) then under the inherent jurisdiction of the court. This is not an ordinary case. The Affidavits filed in connection with the application for summary judgment were very voluminous on both sides and perhaps one may be excused for having taken the view that both sides had disclosed every document relevant to the claim or the defen-

ce as the case may be. As Solicitor for both parties, one may be excused perhaps for thinking that the first Defendant would have known of the identity and existence of any other documents which were relevant to this matter and have commented on them in his Affidavits if there were such documents in existence. But there is no reference to any specific facts or documents in the Affidavit in Support of the application before me, and I am unable to hold that the Defendant has been prejudiced by the omission to go through the motions of taking out a Summons for Directions in the present case. Accordingly I hold that there is no substance in the first point also.

It must follow from this that the application by the first Defendant for a stay until the parties have gone through the process of general discovery must also fail. This trial has already begun on April 9, 1984 and is now part heard. In the nature of things and the court lists it may be some months before the case can be proceeded with and if there are any specific applications the parties wish to make it is still not too late provided the same is done promptly, for good reason and just cause.

I now turn to the prayer for the variation of the order made on March 10, 1984 that the first Defendant be permitted to provide security in shares or property for the sum of $1,160,000/– to the satisfaction of the Registrar. The grounds urged in support of the application are that undue hardship is being caused to the first Defendant in that he is paying nearly $15,000/– a month for the Bank Guarantee. It is further urged that since the order has not been extracted this court has the power to vary the same in the manner requested. It is further urged that on February 27, 1984 when the court granted an extension of time to fulfil the conditions for leave to defend till March 13, 1984 the parties were given liberty to apply and that this must be taken to sanction the present application for a variation of the order.

What is meant by "liberty to apply" is set out in para 2006 of the *Supreme Court Practice 1979*, Vol. 2 at page 605. It is given to enable matters to be dealt with in the implementation of the order. It does not give a right to ask the court to vary an order (*Cristal* v. *Cristal*[1]).

On February 27, 1984 the court had before it Summons-in-Chambers Entered No. 27 of 1984 containing an application by the first and second Defendants to substitute a bank guarantee for the cash required to be deposited. Mr. Thara Singh Sidhu specifically informed the court that he was not proceeding with the appeal and in Mr. Subra Naicker's absence asked for an extension of 2 weeks. Financial hardship was urged as the reason for the extension. This was granted and the liberty to apply related to the manner on which the conditions for the leave to defend should be fulfilled by March 13, 1984.

On March 10, 1984 the court had before it Summons-in-Chambers Entered 76 of 1984. It was similarly worded to the earlier Summons Entered 27 of 1984, with the omission of the prayer for the extension. What bears emphasis is that the order made on this application was made by consent. The Summons asked for a guarantee for $1.12 million. Mr. Subra Naicker wanted it for $1.16 million and required it to be in terms acceptable to him. To this Mr. Paramjothy agreed and an order was made accordingly.

The proposition that a consent order can only be varied by consent in the absence of fraud or some other circumstances which vitiate the consent, is too well established to need authority.

Does the fact that the order has not yet been extracted make a difference? This order was made for the first Defendant's benefit and at his request. His solicitor acted upon and furnished the guarantee accordingly. The duty to extract the order fell upon him (see Order 42 rule 8). How this obligation is to be enforced is not entirely clear (See *Mallal's* Supreme Court Practice 2nd edition page 494) but I cannot see how the first Defendant's Solicitor's omission can be prayed in aid of the situation here.

If the first Defendant is indeed paying nearly $15,000/– per month for the guarantee then I must state my regret at holding myself unable to terminate what he considers to be a financial oppression. The Bank must of necessity be holding adequate collateral. Since no money has yet been paid out pursuant to the guarantee it is hard to see why there should be any interest charges accruing now especially of the magnitude of $180,000 per annum. Is it not more usual in such cases to charge a percentage plus perhaps a commitment fee? Nevertheless if the Plaintiff's Solicitors can be satisfied of the facts it makes good sense for them to agree that the collateral now held by the Bank for this facility should be held by the Registrar of this Court, especially if it will save the

first Defendant $15,000 per month. But it is matter for them.

I now come to the last issue in this application namely that this action be heard by another Judge in view of the fact that I heard the Order 14 application and generally for the reasons set out in the first Defendant's letter dated April 3, 1984.

It is trite law that a litigant should not have two bites at the cherry. This very application was made by the first Defendant on April 9, 1984 and on the same grounds. It was made orally and in Open Court and it was refused. The remedy of the first Defendant if he was dissatisfied with that order of refusal was to appeal against it and his grievances could have been ventilated in the Federal Court. Instead on April 17, 1984 the first Defendant chose to make the same application again by the present Summons-in-Chambers. Even though this application is technically impermissible it seems to me desirable in all circumstances of this case that I should deal fully with the grounds on which the first Defendant has sought a transfer.

The first and main ground is that because I ordered leave to defend only upon terms that the full sum be paid into court, I was automatically disqualified from adjudicating the main action. It is now urged that I could only have made that order upon the premise that I was then prepared "very nearly to give judgment" for the Plaintiff. The alleged disqualification as I understand it, is that having almost made up my mind against the First Defendant in the proceedings for summary judgment I would be biased against him at the trial and he would not therefore be able to have a fair, proper or satisfactory hearing.

What the first Defendant appears to have overlooked is that the order was that he be given leave to defend. Far from shutting him out, it left the field open for him to test the strength of the Plaintiff's case against him in Open Court and for him to marshall and deploy his own evidence in support of his case at the trial.

The contention that a judge who gives leave to defend upon terms should thereafter not hear the case at the trial is not supported by any authority. The contention is also not calculated to facilitate the efficient disposal of cases but rather to delay the business of the courts even further.

Furthermore the Defendants knew on February 16, 1984 that the case had been fixed for hearing before me on March 27, 1984. If the first Defendant found this objectionable why was this not made known then or at least shortly thereafter. Counsel for the first Defendant not only gave notice that the appeal was being withdrawn but continued with other interlocutory applications before the same Judge and appeared in open court on March 27, 1984. The objection was not taken even then. He agreed to carry on before me on April 9 and an adjournment was granted on that basis.

In the circumstances it was not unreasonable for the Plaintiffs to contend that this application was motivated by other extraneous considerations designed to force a further postponement of the case.

For myself I would prefer to express myself thus. The order granting conditional leave was made on the materials before me on February 16, 1984. The trial has now begun and I do not consider myself under any inhibition from giving the parties a fair hearing as soon as the court is ready to proceed. The stage which the proceedings have reached does not in any way prevent or preclude the first Defendant from putting forward his case as he is best advised.

Mr. Suppiah stated the first Defendant would be happier if somebody else heard this case. The law is clearly spelt out in *R.* v. *Camborne Justices*[2] and in *Brassington* v. *Brassington*[3]. The test is whether a real likelihood of bias has been shown. A mere apprehension of bias is not enough. A feeling of greater happiness with another judge, with due respect to Counsel, must be even less so.

I now turn to the other reasons for this application which are contained in the first Defendant's letter dated April 3, 1984.

Mr. Suppiah has said for the first Defendant that when this letter was written the first Defendant was in a very troubled state of mind. In his affidavit dated April 17, 1984 the first Defendant says that in fact he is harassed, confused and depressed.

These matters may constitute grounds for taking a charitable view of the first Defendant's complaints and his apparent unhappiness with his prior legal advisor at the time but the criticisms must nevertheless be dealt with.

Those relating to the fact that the Order 14 application was heard not by the Registrar but by the Judge should properly have been voiced before or on November 24, 1983 or at the latest by February 12, 1984. They were not. Then there was a reference to certain comments allegedly made during the Open Court hearing which had caused the first Defendant some unhappiness. Again nothing was said at the time. I have no personal recollection of having said what is attributed to me a month and a half later. To my mind there is every probability that the first Defendant misheard what was said, for the subject of discussion then was not that he charmed but that he charged the Plaintiffs $1 million and was required to explain what special services he had rendered in that respect. The other complaints relate to the content of the order granting leave and the date fixed for the trial. These were not voiced at the time either and were properly matters for the appeal which was in any event withdrawn before the letter was written.

The next lot of grievances relate to the reluctance to grant an adjournment when the matter came on for the first hearing on March 27, 1984, the alleged refusal of the court to allow Mr. Thara Singh Sidhu to discharge himself and the fixing of the case for continued hearing on April 9, 1984.

But on March 27, 1984 itself the first Defendant's Counsel withdrew his application to discharge himself and jointly applied to have the case proceeded with on April 9, 1984. Having done so it is very difficult to see how these alleged grievances can be resurrected on April 17, 1984 for a transfer. The mere absence of a client by itself is not ground for an adjournment especially where the absent client is represented by Counsel who is fully seised of the facts relating to the case. And once a Solicitor comes on record he can only discharge himself for good reason and with the concurrence of the court.

The other complaints need not detain us here. They all concern matters which were within the knowledge of himself and his Counsel on February 16, 1984 and it would be a denial of justice to the parties to this action to allow them to be agitated now, even if there were any substance to them, which in my view they have not.

Mr. Suppiah has argued this matter with commendable restraint. The more so as he had a most difficult task to perform. But in his letter Mr. Chua says that he wishes to stress that he is not casting any imputation or allegation at all on the trial judge but that he is truly afraid he will not get a fair hearing. A subjective apprehension of bias is not enough. The first Defendant fervently hopes that "not only must justice be done but must be seen to be done".

In *R.* v. *Camborne Justices*[2] Slade J. said at page 855

> "The frequency with which allegations of bias have come before the courts in recent times seems to indicate that the reminder of LORD HEWART, C.J. in *R.* v. *Sussex JJ. Ex p. McCarthy* ([1924] 1 K.B. 259) that it is 'of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done' is being urged as a warrant for quashing convictions or invalidating orders on quite unsubstantial grounds, and indeed, in some cases, on the flimsiest pretexts of bias. While indorsing and fully maintaining the integrity of the principle reasserted by Lord Hewart, C.J., this court feels that the continued citation of it in cases to which it is not applicable may lead to the erroneous impression that it is more important that justice should appear to be done than that it should in fact be done."

On April 9, 1984 when the first Defendant made his oral application for a transfer I was of the opinion that there was no real likelihood of bias and it was for this reason that I dismissed the application. Having heard Mr. Suppiah and the Counsel for the other parties and reconsidered this matter I am still of the same view and accordingly dismiss this application also. This hearing must now proceed if and when the court's calendar permits.

The costs of this application will be taxed and paid by the first Defendant to the other parties involved.

Order accordingly.

Solicitors: *Subra Naicker & Co.: Suppiah & Singh; Fernandez & Partners; Sri Ram, Kumar & Zulkifly; Chew & Co.*